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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 390

THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
Petitioners,

—v.—

PUBLIC SERVICE COMMISSION OF INDIANA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

REPLY BRIEF FOR PETITIONERS

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The Brief in Opposition seeks to make two principal points. First, that the Indiana Supreme Court treated as proved Petitioners' allegations as to the technological developments in railroading since the enactment of the Indiana Full Crew Law, and that, accordingly, Petitioners were not injured by being deprived of a hearing on the merits (Br. in Op. 15-17); and, secondly, that even though the Indiana Supreme Court retroactively converted the proceedings on the temporary injunction into a final trial on a permanent injunction, Petitioners were not hurt because there was a bulky record made in connection with the proceedings on the temporary injunction. (Br. in Op. 13-15, 17-21)

Respondents do not, of course, deny that the Indiana Supreme Court retroactively converted the temporary in-

junction proceedings into a final hearing, nor do they deny the fact that under state law this action was without substantial precedent and, accordingly, that Petitioners had no notice of it.

We will reply in turn to the two main points made by Respondents.

1. The Indiana Supreme Court obviously did not, in connection with its decision on the merits, consider as proved the facts alleged by Petitioners with respect to the technological developments in modern railroading—so important on the question of unreasonable burden on interstate commerce and on the substantive Due Process and Equal Protection questions. The passage of the Court's opinion holding the state Full Crew Law constitutional appears at Pet. App. 9a-10a. The dispositive paragraph is the first paragraph on page 10a, and no indication is made that the court is considering the alleged changes in railroading technology in reaching its decision.

The passage relied on so much by Respondents to this effect appears at Pet. App. 11a, in the midst of a discussion of the principles which govern the grant of a temporary injunction—reversal of the Superior Court's grant of which is separately dealt with in the Supreme Court's opinion. (Pet. App. 10a-13a) The discussion is obviously pointed simply to the equities of the grant of a temporary injunction. While the technological improvements are admitted *arguendo* by the court, the court's response is that the changes were only made to meet competition, and that there has not been, it says, improved service to the public by reason thereof. (Pet. App. 12a) —But this reasoning obviously has nothing to do with the merits of the case; the court's discussion of these matters could only relate to the

equities of the grant of the temporary injunction.[1] Apparently at this point it was stating that the fact that the railroads had introduced modern developments did not create an equity justifying the temporary order.

In this connection, the attempt of Respondents (Br. in Op. 15-17) to distinguish what the Indiana Supreme Court did from what this Court condemned in *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U.S. 405 (1935), simply demonstrates that this case is entirely similar to *Walters.* As the passage quoted from that opinion by Respondents itself demonstrates (Br. in Op. 15-16), in *Walters,* the lower court, in the practice condemned, "held that the statute was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority [to pass it] . . . and that the Court could not 'any more' consider 'whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions,' than it 'could consider changed mental attitudes to determine the constitutionality and enforceability of a statute.' . . . " 294 U.S., at 414-15. But here, the Indiana Supreme Court did exactly the same thing. It simply reasoned that the fact that the 1907 Indiana Act, predecessor to the 1937 Full Crew Law, had been upheld as constitutional at an early date, and the fact that the 1937 Act had earlier been upheld at the trial court level, "together with the rule of law that the constitutionality of an act is presumed, until

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[1] The Indiana Supreme Court's opinion appears to be one whose first thrust was simply to reverse the grant of the temporary injunction, on which there has been superimposed in drafting other material reaching the conclusion that the complaint should be dismissed in its entirety.

overthrown by the courts . . . provides cogent reasons to support the act here in controversy." (Pet. App. 10a) —And even if the court's discussion of the improvements in technology is deemed related to the constitutional question, all it said on that score was the following: "In any event, the alleged improvements in technology and operating changes cannot here be used to justify a reduction in appellees work force. Such relief, if justified, is properly found in the legislature and not the courts." (Pet. App. 12a) —But this is simply to say that those changed circumstances and technological improvements are extrinsic matters, irrelevant to constitutional decision. If this is not a clear refusal to consider evidence of changed circumstances, such as was condemned in the *Walters* case, one could hardly be imagined.

In any event, even if the Indiana Supreme Court had been content to try the constitutionality of the Indiana Full Crew Law under the Commerce Clause, the Due Process Clause and the Equal Protection Clause, in 1966 on the basis of a simple acceptance of the allegations of the complaint as to the extensive developments in railroad technology over the past thirty years, this is obviously not a permissible way of adjudicating these Federal constitutional issues. See Pet. 10-11; *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945); *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520, 528 (1959). Development of a full factual record was called for. Even if the Indiana Supreme Court is accustomed to adjudicating constitutional issues in an abstract fashion, this Court, as its decisions teach, clearly does not follow any such practice; and the Indiana Supreme Court's refusal to permit a factual record to be developed stands as a clog upon review of the under-

lying substantive Federal constitutional contentions by this Court.[2]

Indeed, in this respect, the Respondents imply that factual questions as to the effect of technological development on the railroads, and its relation to the reasonableness of manning levels and to safety, are not in serious dispute. —Of course, only if there were no dispute as to the matter, so that the case presented no issues of fact, could the action of the Indiana Supreme Court be justified. *Cf. Hurwitz* v. *Directors Guild of America, Incorporated,* No. 30215, 2d Cir., Slip Opinion, p. 2662, July 14, 1966; *North Carolina R. Co.* v. *Story,* 268 U.S. 288, 292 (1925). —This is an astounding implication. For nothing could be more controversial than the question of the impact of the railroads' technological developments upon manning levels and the question of railroad safety. This was, after all, the issue which generated the threatened rail strike in 1963 (see *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.,* 372 U.S. 284 (1963), which required Congress to pass the compulsory arbitration law (Public Law 88-108, 77 Stat. 132 (1963)), and which provoked bitter dissent among the members of the Arbitration Board created by the Act of Congress after their protracted hearings. See *Award of National Arbitration Board No. 282,* 41 Lab. Arb. 673 (1963). Certainly before the court below undertook to pass definitively on the issues under the Commerce Clause and the Due Process and Equal Protection Clauses, the essential

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[2] Indeed, it is for this very reason that we have not sought to tender the underlying Federal substantive constitutional issues to this Court at this time. We scarcely need add that this does not constitute a waiver of those issues on remand to the state courts should this Court grant our Petition, or on subsequent review by this Court after such a remand. (*Cf.* Br. in Op. 17)

facts as to which are bound up with this controversial subject matter, there should have been a full evidentiary record; and obviously such a record is essential to this Court's ultimate review of the substantive questions.[3]

2. Likewise, the repeated suggestions by Respondents that because a physically bulky record was produced on the temporary injunction proceedings, the Petitioners were not hurt by the retroactive conversion of those proceedings into a trial of the case on the merits,[4] are without substance. In the first place, although the Respondents refer to the record on the temporary injunction proceedings as a "transcript"—as indeed the Indiana procedure styles it—the fact of the matter is that there was no oral hearing at which live witnesses were examined. The "transcript" is simply a record of affidavits and documentary material; not a single witness was examined orally. This meant, of course, that Petitioners could not cross-examine the witnesses whose affidavits or documentary proofs were put in by Respon-

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[3] Whether the full record would "operate to result in a different decision" (Br. in Op. 14) from the Indiana Supreme Court is not dispositive, for that court does not have the last word on the federal constitutional issues.

Respondents suggest (Br. in Op. 11) that Petitioners are simply seeking delay in this matter. Since there is no longer even a limited stay of the Full Crew Law in effect, it is hard to tell what the purpose of any such "delay" would be.

[4] On the merits of the constitutional question caused by this retroactive conversion, Respondents emphasize (Br. in Op. 12) a passage from the opinion of this Court in *Board of Comm'rs* v. *Lucas*, 93 U.S. 108 (1876), to the effect that "if, upon an appeal from an interlocutory order, a final disposition of the merits of a cause can be made in that State, it is no concern of ours." But in the context, this remark was obviously directed to the question whether the Court had before it a final judgment, jurisdictionally prerequisite to its decision of the case; the remark was not directed

dents.[5] Moreover, as far as Petitioners' own proofs were concerned, they were in general taken from the documentary materials which had been generated by the national dispute over train-crew manning questions which culminated in the threatened railroad strike of 1963, and the passage of Public Law 88-108, and from the materials produced incident to the arbitration under Public Law 88-108.[6] These materials were not so much pointed at the situation in Indiana, or to interstate moves through Indiana, specifically as they were to national issues of technological development, manning levels, and safety. They were thought an adequate presentation for purposes of the temporary injunction; and, indeed, the Superior Court granted a temporary injunction on them. But the retroactive action of

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to the constitutionality of the practice. The same is true of *North Carolina R. Co.* v. *Story, supra,* at 292, quoted at Br. in Op. 18. In neither case was there any issue of fact remaining to be tried.

[5] Respondents suggest that Petitioners would not have cross-examined their own witnesses (Br. in Op. 17), but the point is that Petitioners were foreclosed from an opportunity to cross-examine Respondents' affiants, and that this was done retroactively.

[6] Despite the suggestion of Respondents (Br. in Op. 11, 20-21), we have never claimed that the record before the trial court on the temporary injunction proceedings was limited *solely* to the preemption issue. The point is, rather, that the written material which was submitted then was, to the extent that it was not pointed at the preemption issue, material which had been generated by the national controversy which erupted in 1963. This material was not intended by Petitioners to be a final submission on the question whether the Indiana statute conflicts with the Federal Constitution by imposing an unconstitutional burden on interstate commerce, or by violating the Due Process or Equal Protection Clauses. Our contention is simply that there should be a remand in this case to the Indiana trial court for the making of a full record on these issues, just as this Court ordered a remand to the three-judge Federal District Court in *Brotherhood of Locomotive Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966), for the making of a record on the corresponding issues raised by the Arkansas "crew consist" legislation.

the State Supreme Court foreclosed the making of a more particularized record, tested by cross-examination, and pointed at the situation in Indiana, such as would justify a permanent injunction—from that court or this Court—holding the Indiana Law unconstitutional.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and in this Reply Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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